

CASE NO. _____
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

James H. Roane, Jr.
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

*SHAWN NOLAN
Chief, Capital Habeas Unit
JULES WELSH
Assistant Federal Defender
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Shawn_Nolan@fd.org
(215) 928-0520

Counsel for Petitioner James H. Roane, Jr.

**Member of the Supreme Court Bar*

QUESTION PRESENTED

Section 924(c) of Title 18, U.S. Code, which makes it a crime to carry a firearm in furtherance of a “crime of violence,” defines a crime of violence in two alternate clauses: the force clause under § 924(c)(3)(A) and the residual clause under § 924(c)(3)(B). In *United States v. Davis*, 588 U.S. 445 (2019), this Court determined that the residual clause of § 924(c)(3)(B) is void for vagueness. Thus, the predicate offenses only remain valid crimes of violence if they fall under the force clause of § 924(c)(3)(A).

In *Borden v. United States*, 593 U.S. 420, 429 (2021), this Court explained that a predicate offense satisfies the force clause of § 924(c) only if it requires the purposeful or knowing use of violent force. To make this determination, courts must apply the categorical approach.

Here, the predicate offenses of Petitioner’s § 924(c) convictions were convictions under the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. § 1959, which makes it a crime to support a racketeering enterprise by committing an enumerated offense—including murder, maiming, and assault with a dangerous weapon—“in violation of the laws of any State or the United States.” § 1959(a).

The Fourth Circuit, rather than applying the categorical approach to the specific statute underpinning the VICAR convictions, instead presumed that all VICAR offenses satisfy the force clause via the VICAR statute’s general requirement that the defendant had a racketeering purpose.

The question presented is: When a § 924(c) conviction is predicated on a VICAR offense, must a reviewing court apply the categorical approach to the state or federal statute underpinning the VICAR offense to assess whether the underlying statute categorically requires the intentional or knowing use of violent force?¹

¹ This is effectively the same question presented in the petition for certiorari pending before this Court in *Kinard v. United States*, No. 24-5042, and is identical to the question presented by Mr. Roane’s co-defendant in *Tipton v. United States*, No. 24-5322. Mr. Roane respectfully requests that his petition be held for consideration concurrently with or after this Court resolves those matters.

STATEMENT OF RELATED PROCEEDINGS

Roane v. United States, No. 22-7309 (Supreme Court of the United States) (order denying petition for writ of certiorari filed October 30, 2023).

United States v. Roane, Nos. 92-CR-68, 22-CV-98 (United States District Court for the Eastern District of Virginia) (order denying successive motion pursuant to 28 U.S.C. § 2255 filed November 3, 2022).

United States v. Roane, et al. Nos. 20-14, 20-16 (United States Court of Appeals for the Fourth Circuit) (opinion affirming denial of motion for reduced sentence pursuant to the First Step Act filed October 18, 2022).

In re Roane, No. 20-7 (United States Court of Appeals for the Fourth Circuit) (order granting authorization to file successive motion pursuant to 28 U.S.C. § 2255 filed January 24, 2022).

United States v. Roane, No. 92-CR-68 (United States District Court for the Eastern District of Virginia) (order denying motion for reduced sentence pursuant to the First Step Act filed October 29, 2020).

In re Roane, No. 16-6 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed June 6, 2016).

In re Roane, No. 10-7304 (Supreme Court of the United States) (order denying petition for writ of habeas corpus filed October 3, 2011).

In re Roane, No. 09-8 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed July 13, 2010).

Roane v. United States, No. 04-1136 (Supreme Court of the United States) (order denying petition for writ of certiorari filed October 3, 2005).

United States v. Roane, et al., Nos. 03-13, 03-25, 03-26, 03-27 (United States Court of Appeals for the Fourth Circuit) (opinion affirming in part and reversing in part order granting in part motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 filed August 9, 2004).

United States v. Roane, No. 92-CR-68 (United States District Court for the Eastern District of Virginia) (order granting in part motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 filed May 1, 2003).

Roane v. United States, No. 96-7639 (Supreme Court of the United States) (order denying petition for certiorari filed June 2, 1997).

United States v. Roane, No. 92-CR-68-3 (United States District Court for the Eastern District of Virginia) (judgment of guilt and sentence of death entered June 1, 1993).

TABLE OF CONTENTS

QUESTION PRESENTED	i
STATEMENT OF RELATED PROCEEDINGS	ii
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	4
I. The Fourth Circuit’s Approach Violates this Court’s Precedent.	6
II. The Approach Adopted by the Second, Tenth, and Eleventh Circuits Adheres to this Court’s Precedent.	9
CONCLUSION.....	12

TABLE OF APPENDICES

Appendix A – Order Denying Petition for Rehearing, <i>United States v. Tipton</i> , No. 23-1 (4th Cir. May 14, 2024)	A1
Appendix B – Opinion, <i>United States v. Tipton</i> , 95 F.4th 831 (4th Cir. 2024)	A2
Appendix C – Memorandum Opinion, <i>United States v. Roane</i> , Nos. 92-CR-68, 22-CV-98 (E.D. Va. Nov. 3, 2022)	A36

TABLE OF AUTHORITIES

Federal Cases

<i>United States v. Kinard</i> , 93 F.4th 213 (4th Cir. 2024)	9
<i>Alvarado-Linares v. United States</i> , 44 F.4th 1334–43 (11th Cir. 2022)	10, 11
<i>Borden v. United States</i> , 593 U.S. 420 (2021)	<i>passim</i>
<i>Descamps v. United States</i> , 570 U.S. 254–61 (2013)	4
<i>United States v. Manley</i> , 52 F.4th 143 (4th Cir. 2022)	5, 6
<i>United States v. Davis</i> , 588 U.S. 445 (2019)	i, 2, 4
<i>United States v. Laurent</i> , 33 F.4th 63 (2nd Cir. 2022)	10
<i>United States v. Mathis</i> , 932 F.3d 242 (4th Cir. 2019)	6–7
<i>United States v. Morris</i> , 61 F.4th 311 (2nd Cir. 2023)	10
<i>United States v. Pastore</i> , 36 F.4th 423 (2nd Cir. 2022)	10
<i>United States v. Thomas</i> , 87 F.4th 267 (4th Cir. 2023)	3, 7
<i>United States v. Tipton</i> , 95 F.4th 831 (4th Cir. 2024)	1, 3, 7
<i>United States v. Umaña</i> , 750 F.3d 320 (4th Cir. 2014)	8–9
<i>United States v. White</i> , 7 F.4th 90 (2nd Cir. 2021)	10, 11
<i>United States v. Zelaya</i> , 908 F.3d 920 (4th Cir. 2018)	8

Federal Statutes

18 U.S.C. § 924	<i>passim</i>
18 U.S.C. § 1254	1
18 U.S.C. § 1959	<i>passim</i>
21 U.S.C. § 846	2
21 U.S.C. § 848	2
28 U.S.C. § 2255	ii, iii, 3

Rules

R. 10	4
-------------	---

OPINIONS BELOW

The opinion of the court of appeals is titled *United States v. Tipton*, 95 F.4th 831 (4th Cir. 2024), and appears in the appendix to the petition at A2. The opinion of the district court is unreported and appears at A36.

JURISDICTION

The court of appeals issued its opinion and denied a petition for rehearing and rehearing en banc on May 14, 2024. The jurisdiction of this Court is invoked under 18 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(c)(1)(A) provides:

. . . [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . .

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Section 924(c)(3) further provides:

. . . [T]he term “crime of violence” means an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

The VICAR statute 18 U.S.C. § 1959(a) provides:

Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily

injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of [1] under this title, or both.

STATEMENT OF THE CASE

Following a jury trial in the Eastern District of Virginia, Mr. Roane was convicted in 1993 of several counts, including using a firearm in the commission of a crime of violence or drug trafficking under § 924(c). The § 924(c) counts (Counts 6, 9, 12, and 15) alleged as predicate offenses: murder and maiming in furtherance of racketeering under § 1959(a); murder in furtherance of a continuing criminal enterprise under 21 U.S.C. § 848(e)(1)(A); and a drug distribution conspiracy under 21 U.S.C. § 846.

This matter arose following this Court's decision in *United States v. Davis*, 588 U.S. 445 (2019), which determined that the residual clause of § 924(c)(3)(B) is void for vagueness. Thus, a predicate offense could only remain a valid crime of violence if it satisfied § 924(c)(3)(A)'s remaining force or elements clause. Following *Davis*,

Mr. Roane timely applied to the Fourth Circuit for leave to file a successive motion under 28 U.S.C. § 2255 to vacate his § 924(c) convictions, alleging that the predicate offenses for those convictions did not qualify as crimes of violence under the force clause. While the application was pending, this Court also decided *Borden v. United States*, 593 U.S. 420, 429 (2021), in which it held that a § 924(c) crime of violence predicate must entail a mens rea of purposeful or knowing conduct.

The Fourth Circuit granted Mr. Roane’s motion for authorization under § 2255. Following the Fourth Circuit’s authorization, Mr. Roane lodged his § 2255 motion in the district court, and the district court denied the motion. The Fourth Circuit granted a certificate of appealability.

The Fourth Circuit panel entered a consolidated opinion affirming the district court’s opinions for both Mr. Roane and his co-defendant, Richard Tipton. The Fourth Circuit held that both Mr. Roane and Mr. Tipton’s VICAR offenses were valid crime-of-violence predicates to support their § 924(c) convictions. *Tipton*, 95 F.4th at 846–48. The panel reasoned that following its recent decision in *United States v. Thomas*, 87 F.4th 267 (4th Cir. 2023), where the Fourth Circuit first held that VICAR’s “purpose element” requires in every instance a mens rea of purposeful and knowing conduct, VICAR murder necessarily “carries with it a requisite mens rea that is greater than recklessness, as required by *Borden*.” *Tipton*, 95 F.4th at 848 (quoting *Thomas*, 87 F.4th at 274). The panel also rejected the proposition that “the proper § 924(c) ‘crime of violence’ analysis of a VICAR offense requires a court to ‘look through’ the VICAR statute to the underlying violation of state or federal law.” *Id.* at 849.

Mr. Roane filed a timely petition for rehearing en banc, which was denied on May 14, 2024.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has “decided an important federal question in a way that conflicts with relevant decisions” of this Court and has “entered a decision in conflict with the decision of another United States court of appeals.” Sup. Ct. R. 10(a); (c). The Fourth Circuit’s holding in this case extends *Thomas*’s contradiction of this Court’s holding in *Borden*; it is also out of step with three other circuits that have addressed this issue, creating a split in the circuits.

Section 924(c) makes it a felony to carry a firearm in furtherance of a “crime of violence,” defined as an offense that has as an element “the use, attempted use, or threatened use of physical force.” 18 U.S.C. 924(c)(3)(A); *see Borden*, 593 U.S. at 424; *Davis*, 588 U.S. at 470. Courts apply the categorical approach to determine whether a predicate offense meets that definition. Under the categorical approach, courts examine only whether the statutory elements of the offense—not the defendant’s conduct—necessarily require the use, attempted use, or threatened use of physical force. If any criminal conduct covered by the statute does not require the use of force, the offense does not qualify as a categorical crime of violence. *Descamps v. United States*, 570 U.S. 254, 260–61 (2013). Moreover, under *Borden*, the statute must require a mens rea of purposeful or knowing conduct, and that mens rea requirement must attach to the use of violent force. *Borden*, 593 U.S. at 424.

Here, Mr. Roane’s § 924(c) convictions were predicated on VICAR offenses. To obtain a conviction under the VICAR statute, § 1959(a), the Government must prove the following elements:

(1) that there be an “enterprise,” as defined in § 1959(b)(2); (2) that the enterprise be engaged in “racketeering activity,” as defined in 18 U.S.C. § 1961; (3) that the defendant have committed an assault “with a dangerous weapon” or “resulting in serious bodily injury”; (4) *that the assault have violated state or federal law*; and (5) that the assault have been committed for a designated pecuniary purpose or “for the purpose of gaining entrance to or maintaining or increasing position in [the] enterprise.”

United States v. Manley, 52 F.4th 143, 147 (4th Cir. 2022) (quoting § 1959(a)(3)) (emphasis supplied).

Any VICAR offense therefore requires a predicate state or federal offense, and the elements of the VICAR offense incorporate the elements of that predicate.

Prior to this Court’s decision in *Davis*, all VICAR convictions served as valid § 924(c) predicate offenses because they met the “crime of violence” definition under the residual clause of § 924(c)(3)(B). Since this Court struck down the residual clause as void for vagueness, courts have applied the “categorical approach” to determine whether a VICAR offense remains a valid “crime of violence” predicate under the force clause of § 924(c)(3)(A). *Borden*, 593 U.S. at 424. Circuit courts have diverged, however, on whether to apply the categorical approach to the state or federal statute underpinning the VICAR offense. This question has resulted in an inter-Circuit split.

The Second, Tenth, and Eleventh Circuit courts have determined that, when a § 924(c) conviction is predicated on a VICAR offense, a reviewing court must apply the categorical approach to the state or federal statute underpinning the VICAR

offense to assess whether the underlying statute categorically requires the intentional or knowing use of violent force. If the elements of the underlying statute amount to a categorical crime of violence, the VICAR conviction is a valid § 924(c) predicate. If they do not, the VICAR conviction is an invalid § 924(c) predicate.

By contrast, the Fourth Circuit has imputed the VICAR statute's general racketeering purpose element to determine that all VICAR offenses satisfy *Borden's* mens rea requirement, regardless of the state or federal law underpinning the VICAR conviction. As a result, any VICAR conviction can act as a valid § 924(c) predicate even if the elements of the statute incorporated into the VICAR offense do not categorically require the intentional or knowing use of violent force. The Fourth Circuit's approach—which it applied to deny Mr. Roane relief—violates the principles established in *Borden*. The Court should grant certiorari to correct this misstep and to resolve the circuit split.

I. The Fourth Circuit's Approach Violates this Court's Precedent.

Prior to *Thomas*, the Fourth Circuit had held—consistent with other circuits—that the mens rea of the underlying state or federal offense is incorporated as an element of the VICAR statute and, therefore, directed courts to look through to the underlying state or federal offense to determine whether it categorically required the intentional or knowing use of violent force. *See, e.g., Manley*, 52 F.4th at 148 (“[B]ecause the Virginia offense constitutes an element of the VICAR offense, it is proper to examine whether a conviction under the Virginia statute would be a crime of violence.”); *United States v. Mathis*, 932 F.3d 242, 264–67 (4th Cir. 2019) (vacating defendants' § 924(c) convictions that were predicated on VICAR convictions for

kidnapping under Virginia Code Section 18.2-47 because the Virginia kidnapping statute did not satisfy the force clause).

In *Thomas*, however, the Fourth Circuit changed its position and held that VICAR predicates are categorically valid crimes of violence for purposes of § 924(c) convictions, regardless of the elements of the incorporated crime, simply because a separate element of every VICAR offense is that the defendant had a racketeering purpose. 87 F.4th at 274 (“The VICAR statute’s purposefulness requirement applies to *every* offense in § 1959(a)[.]” (emphasis added)). *See also, id.* at 271 (“We see no need to ‘look through’ the offense to its state-law predicates.”). To determine whether the VICAR conviction constitutes a “crime of violence,” the Fourth Circuit now holds that “the generic federal [VICAR] offense standing alone” satisfies § 924(c)’s force clause, and courts therefore “need not progress to the state law predicates.” *Id.* at 275. The Fourth Circuit applied the *Thomas* reasoning to uphold Mr. Roane’s § 924(c) convictions below. *Tipton*, 95 F.4th at 849–50 (holding that it need not “‘look through’ the VICAR statute to the underlying state or federal law” because it “need only decide whether the generic federal murder offense” qualifies as a crime of violence).

The Fourth Circuit’s approach adopted in *Thomas* violates *Borden*. An element of every VICAR offense is that the defendant committed the offense “for the purpose of gaining entrance to or maintaining or increasing position” in the racketeering enterprise. 18 U.S.C. 1959(a). According to the Fourth Circuit, VICAR’s independent purpose element removes the possibility that a person could commit the underlying predicate offense for a VICAR conviction recklessly. This is inconsistent with *Borden*,

which holds that a predicate offense cannot qualify as a “crime of violence” under the force clause without a mens rea of purposeful or knowing conduct. 593 U.S. at 429. Moreover, the purposeful or knowing mens rea element must attach to the use of physical force, and the perpetrator must “direct his action at, or target, another individual.” *Id.* See also *id.* at 438 (force clause requires “a deliberate choice of wreaking harm on another”); *id.* at 445 (force clause requires “the active employment of force against another person”).

Thomas violates this principle by imputing the mens rea from the purpose element of the VICAR statute. The VICAR mens rea—which merely requires that an action be taken “for the purpose of gaining entrance to or maintaining or increasing position” in a racketeering enterprise—is divorced from the actual violent conduct proscribed by the underlying state or federal statute and does not require a purposeful or knowing use of physical force. Indeed, years before *Thomas* the Fourth Circuit explicitly held that under § 1959(a) there need not be a nexus between the VICAR purpose element and any underlying violent conduct. See, e.g., *United States v. Zelaya*, 908 F.3d 920, 927 (4th Cir. 2018) (“The government need not show any nexus between the act of violence and the racketeering activity to prove that a defendant committed a violent crime in order to maintain or increase his position in a racketeering enterprise.” (internal quotations omitted)); *United States v. Umaña*, 750 F.3d 320, 335 (4th Cir. 2014) (activity supporting the VICAR purpose element “could occur before commission of a violent crime covered by the statute . . . or after

commission of a violent crime”). Concurring in *United States v. Kinard*, Judge Keenan provided the following illustration:

Consider a defendant riding in a car late at night who sees a rival gang member’s empty car parked on a deserted street in the defendant’s gang’s territory. The defendant fires a “warning shot” out his car’s window. As he passes the empty car, the defendant sees that the bullet has hit and injured a rival gang member, whom the defendant had not seen standing nearby. When the defendant returns to his gang’s headquarters, he brags to his superiors that he shot the rival gang member.

In that scenario, the defendant purposefully fired the gun, but he did not purposefully hit the individual he had not seen. Instead, in firing the gun and injuring a person, the defendant paid insufficient attention to the potential application of force and consciously disregarded a substantial and unjustifiable risk. In other words, the defendant in this example recklessly applied force to an individual, rather than directing force at a target.

93 F.4th 213, 219 (4th Cir. 2024) (Keenan, J., joined by Heytens, J., concurring) (cleaned up).

In Judge Keenan’s example, the defendant’s use of force is reckless; nevertheless, under the reasoning of *Thomas*, such an offense would satisfy VICAR’s purpose element and would thus qualify as a predicate crime of violence. Such reasoning directly contradicts *Borden*. This Court should grant certiorari to correct this misstep.

II. The Approach Adopted by the Second, Tenth, and Eleventh Circuits Adheres to this Court’s Precedent.

In contrast to the Fourth Circuit, several other circuit courts have addressed this issue and correctly concluded that they must apply the categorical analysis to the elements of the incorporated state or federal offense. The Second, Tenth, and Eleventh Circuits have determined that, when a § 924(c) conviction is predicated on

a VICAR offense, a reviewing court must apply the categorical approach to the state or federal statute underpinning the VICAR offense.

For example, the Second Circuit recognized that a “substantive VICAR offense hinges on the underlying predicate [state law] offense.” *United States v. Pastore*, 36 F.4th 423, 429 (2nd Cir. 2022) (cleaned up). It accordingly directs reviewing courts to “look to that predicate offense” to identify the elements analyzed under the categorical approach. *Id.* The Second Circuit elaborated on its three-step approach as follows:

- (1) “[T]he first step...is to determine which” of the specific offenses enumerated in § 1959 “is the predicate crime of violence underlying” the § 924(c) conviction.
- (2) “The second step...is to determine which laws of any State or the United States” the defendant “violated during the commission of the specific VICAR” offense.
- (3) The “third and final step is to determine whether the committed VICAR [offense], premised on a violation of the relevant state or federal law identified at Step Two, is a crime of violence under § 924(c)’s elements clause.”

United States v. Morris, 61 F.4th 311, 318 (2nd Cir. 2023) (cleaned up).

The Second Circuit has reaffirmed this approach repeatedly. *See, e.g., United States v. Laurent*, 33 F.4th 63, 92 (2nd Cir. 2022); *United States v. White*, 7 F.4th 90, 104 (2nd Cir. 2021).

The Eleventh Circuit has taken the same approach and has also addressed many of the counter-arguments adopted by the Fourth Circuit. In *Alvarado-Linares v. United States*, 44 F.4th 1334, 1342–43 (11th Cir. 2022), the defendant argued that reviewing courts “must look through the VICAR statute to the elements of the

underlying state crime, which is Georgia malice murder,” when applying the categorical approach. *Id.* at 1342. The Government, by contrast, argued that the court “should look only to the generic federal definition of ‘murder’ as that term is used in the [VICAR] statute.” *Id.*

The Eleventh Circuit concluded that the defendant “has the better argument.” *Id.* at 1342–43. The Court explained, “[t]he modified categorical approach requires us to ask whether a crime, as charged and instructed, has ‘as an element the use, attempted use, or threatened use of physical force.’” *Id.* at 1343 (quoting 18 U.S.C. § 924(c)). A reviewing court “cannot answer [that] question...without looking at [the] Georgia law” the defendant is accused of violating. *Id.* The Eleventh Circuit also noted the consistency of its approach with that “adopted by several of our sister circuits when confronted with similar circumstances,” citing cases from the Second and Tenth Circuits. *Citing United States v. Toki*, 23 F.4th 1277, 1279–81 (10th Cir. 2022) (VICAR assault was not crime of violence because underlying Utah and Arizona aggravated assault are not crimes of violence); *United States v. White*, 7 F.4th 90, 104 (2nd Cir. 2021) (VICAR assault was crime of violence where underlying “New York offense of assault in the second degree” was crime of violence).

Toki, the Tenth Circuit decision cited in *Alvarado-Linares*, provides a particularly apt example. In that case, the Tenth Circuit analyzed whether two § 1959(a)(3) convictions—premised on the “Utah and Arizona statutes criminalizing assault with a dangerous weapon”—qualified as crimes of violence. *Id.* at 1280.

Because those state offenses required a mens rea of recklessness, the Court held that they did not satisfy the force clause under *Borden*. *Id.* at 1280–82.

The Second, Tenth, and Eleventh Circuits apply the correct approach. The Court should grant certiorari to resolve the divergence among the circuits.

CONCLUSION

For all the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Shawn Nolan

*SHAWN NOLAN

Chief, Capital Habeas Unit

Federal Community Defender for the

Eastern District of Pennsylvania

601 Walnut Street, Suite 545 West

Philadelphia, PA 19106

Shawn_Nolan@fd.org

(215) 928-0520

Counsel for Petitioner James H. Roane, Jr.

*Member of the Supreme Court Bar

Dated: October 11, 2024